

EXHIBIT F



March 27, 2017

Via E-Mail

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Re: *OFCCP v. Oracle America, Inc. Redwood Shores, California* (OALJ Case No. 2017-OFC-00006)

Dear Ms. Bremer:

We are in receipt of Plaintiff OFCCP's Objections and Answers to Defendant Oracle America, Inc.'s First Set of Interrogatories. This letter addresses various deficiencies in Plaintiff's responses and represents Oracle America Inc.'s (Oracle) attempt to meet and confer with you to resolve these issues without motion practice. The deficiencies in OFCCP's response are considerable. First, the Agency cannot sustain its governmental privileges because it has failed to properly invoke them. Second, OFCCP completely misstates and overstates its legal authority regarding contention interrogatories. Further, OFCCP's arguments are not relevant to the instant matter as OFCCP has, arguably, conducted a full investigation and contention interrogatories are appropriate in the instant matter. In addition, OFCCP's interrogatory responses suffer from other legal and procedural deficiencies, including being woefully short on actual facts despite the Agency's lengthy investigation. For the reasons detailed below, please supplement your responses by April 7, 2017, or we will bring a Motion to Compel before the administrative law judge.

Executive Privileges

The government must formally invoke any government privilege regardless of the privilege. *United States v. O'Neill*, 619 F.2d 222, 225-26 (3d Cir.1980); *Carr v. Monroe Mfg. Co.*, 431 F.2d 384, 388 (5th Cir.1970), *cert. denied sub nom, Aldridge v. Carr*, 400 U.S. 1000, 91 S.Ct. 456, 27 L.Ed.2d 451 (1971). This requirement applies to the executive privilege, *Black v. Sheraton Corp. of America*, 564 F.2d 531, 543 (D.C. Cir.1977); the official information privilege, *Garber v. United States*, 73 F.R.D. 364, 364-64 (D.D.C.1976); the law enforcement investigatory privilege, *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir.1988); and the deliberative processes, or predecisional, privilege. *Mary Imogene Bassett Hosp. v. Sullivan*, 136 F.R.D. 42, 44 (N.D.N.Y.1991). Formal invocation of privilege requirements applies to the Department of Labor. *Martin v. Albany Bus. Journal, Inc.*, 780 F. Supp. 927, 932 (N.D.N.Y. 1992)(absent delegation, requiring Secretary of Labor to formally invoke privilege by personally attesting to its coverage). Here, OFCCP has asserted several executive privileges but has failed to formally invoke the privilege by providing an affidavit that the agency head has personal knowledge of the facts of the case and has personally reviewed the withheld materials. As long as the privileges remain improperly asserted, OFCCP has waived its objections. Accordingly, OFCCP's objections

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based on these privileges must be withdrawn, and any information withheld based on them must be included in OFCCP's responses. Alternatively, if OFCCP attempts to properly invoke these privileges (and if OFCCP can demonstrate they are not waived), Oracle reserves its right to meet and confer further, including by responding in detail to any specific privileges asserted or information withheld, at that time.

OFCCP's General Objections

As an initial matter, OFCCP has the burden of "clarifying, explaining, and supporting its objections." *DIRECTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal. 2002). As described more fully below, OFCCP has not met its burden and, accordingly, must supplement its responses.

General Objection 1. Contention Interrogatories:

Under the Federal Rules of Civil Procedure, "Rule 33(a)(2) provides that interrogatories may relate to any matter that may be inquired into under Rule 26(b) and is not objectionable merely because it asks for contentions that relate to fact or the application of law to fact." *In re eBay Seller Antitrust Litig.*, No. C07-1882 JF (RS), 2008 WL 5212170, at *1 (N.D. Cal. Dec. 11, 2008). OFCCP, as the party answering interrogatories, must furnish "such information as is available to the party." *Sevey v. Soliz*, No. C 10-3677 LHK (PR), 2011 WL 2633826, at *4 (N.D. Cal. July 5, 2011) (citing Fed.R.Civ.P. 33(a)). If a party lacks necessary information to make a full, fair, and specific answer to the interrogatory, it should so state under oath and should set forth in detail efforts made to obtain the information. *Miller v. Doctor's Gen. Hosp.*, 76 F.R.D. 136, 140 (W.D. Okla. 1977); *Hansel v. Shell Oil Corp.*, 169 F.R.D. 303, 305 (E.D. Pa. 1996) ("party may not simply refuse to answer, but must state under oath that he is unable to provide the information and set forth the efforts he used to obtain the information") (citation omitted); *Sevey*, 2011 WL 2633826, at *4 (same).

OFCCP claims that it has no duty to respond to what it claims are contention interrogatories on the grounds that such interrogatories are not allowed at the onset of discovery. OFCCP misstates the law and the facts. First, OFCCP overstates the law as courts are far from unanimous that such interrogatories are improper. *See Starcher v. Correctional Med. Sys., Inc.*, 144 F.3d 418, 421 n.2 (6th Cir. 1998) ("[t]he general view is that contention interrogatories are a perfectly permissible form of discovery, to which a response ordinarily would be required"); *Burch-Lucich v. Lucich*, No. 1:13-cv-218-BLW, 2015 U.S. Dist. LEXIS 1980, at *15-16. (D. Idaho Jan. 5, 2015) ("courts have generally held that contention interrogatories are proper even where they probe a party's contentions as to how the law applies to the facts, explaining that such probing is perfectly permissible and does not invade the work product privilege merely because the party's counsel must disclose the reasoning applying the law to the facts") (citations omitted); *Hamilton v. Radiosback Corp.*, No. C 11-888 LB, 2012 U.S. Dist. LEXIS 84826, at *9 (N.D. Cal. June 18, 2012) (compelling responses to contention

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interrogatory asking plaintiff to “[s]tate all facts which support your contention that RadioShack violated Government Code §12940(k), as alleged in the Third Cause of Action in your complaint”) (citation omitted). Indeed, it has been held that contention interrogatories serve as a check on Fed. R. Civ. P. 11. *U.S. ex rel. O’Connell v. Chapman Univ.*, 245 F.R.D. 646, 649 (C.D. Cal. 2007) (requiring a party to answer contention interrogatories is consistent with Rule 11 of the Federal Rules of Civil Procedure, which requires that plaintiffs must have some factual basis for the allegations in their complaint)(quotations and citation omitted).

Second, OFCCP’s cases are completely off base in the instant context. OFCCP’s cases almost universally relate to instances of litigation between private parties.¹ OFCCP’s cases do not emanate from a robust government enforcement scheme where the government has significant enforcement prerequisites requiring it to select contractors in a manner meeting Fourth Amendment requirements (*Bank of Am. v. Solis*, No. CV 09-2009 (EGS), 2014 WL 4661287, at *1-4 (D.D.C. July 2, 2014)) and audit them under color of regulatory authority (41 C.F.R. § 60-1.20). The Agency’s investigations proceed pursuant to its Federal Contract Compliance Manual (FCCM) and the requirement that it engage in pre-suit duties, such as having reasonable cause to issue a Show Cause Notice (41 C.F.R. § 60-1.28). Formal proceedings occur by referral to the Office of the Solicitor or Department of Justice after a determination that violations exist and that enforcement is appropriate (41 C.F.R. § 60-1.23(b)). As such, when the Agency or the Solicitor’s office files an administrative complaint, the Agency has compiled (or should have compiled) a vast record of facts, claims, and analysis.

¹ See *Miles v. Shanghai Zhenhua Port of Mach. Co.*, No. C08-5743 FDB, 2009 WL 3837523, at *1 (W.D. Wash. Nov. 17, 2009) (products liability, wrongful death, action arising from defendant’s allegedly defective crane than caused Miles’ death); *Aldapa v. Fowler Packing Co. Inc.*, 310 F.R.D. 583, 591 (E.D. Cal. 2015) (precertification class action brought by a private plaintiff, not the government, where “[t]he parties ha[d] not submitted the actual discovery requests at issue to the Court. Accordingly, it is difficult for the Court to analyze Plaintiffs’ contentions and Defendants’ responses”); *Advocate Int’l, L.P. v. Scheckenbach*, No. C08-5332, 2009 WL 3064867 (W.D. Wash. Sept. 24, 2009) (lawsuit to collect fraudulently transferred funds to satisfy a business judgment); *In re eBay Seller Antitrust Litig.*, 2008 WL 5212170, at *2 (private plaintiff antitrust class action related to alleged monopoly over online auctions. Regardless, the court noted that “[t]here is no dispute that, at some point, [plaintiff] Malone will have to respond fully to these discovery requests because eBay is entitled to the relevant information they seek to elicit”); *Campbell v. Facebook, Inc.*, No. 13- 5996-PJH, 2015 WL 3533221, at *5 (N.D. Cal. June 3, 2015) (private party consumer class action alleging privacy violation); *Amgen, Inc. v. Sandoz, Inc.*, No. 14-4741-RS, 2016 WL 1039029, at *4 (N.D. Cal. Mar. 15, 2016) (two private businesses in litigation over patent infringement dispute); *Folz v. Union Pac. R.R. Co.*, No. 13-579-GPC, 2014 WL 357929, at *2 (S.D. Cal. Jan. 31, 2014)(single plaintiff wrongful termination lawsuit, where, regardless, the court noted that “At this stage, if Defendant is unable to supply the requested information, the party may not simply refuse to answer, but must state under oath that he is unable to provide the information and ‘set forth the efforts he used to obtain the information’”(quotations and citation omitted); *J.E.C. v. Berry*, No. C07-4431 RMW, 2011 WL 2441706, at *4 (N.D. Cal. June 15, 2011) (enforcement action against a single defendant for improper stock options, where, regardless, the SEC had responded to the contention interrogatories with four pages of narrative responses detailing the factual allegations.).



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When contention interrogatories are considered in the face of government investigations, it has been held that such interrogatories properly allow the employer to obtain information that exists at the Agency's fingertips. See *EEOC v. Port Auth. of New York*, No. 10-cv-7462(NRB), 2012 WL 1758128 (S.D.N.Y. May 17, 2012) ("Port Authority"), *aff'd*, 768 F.3d 247 (2d Cir. 2014). In *Port Authority*, the EEOC conducted an investigation of compensation claims regarding attorneys in the Port Authority office. The Port Authority moved for a judgment on the pleadings and the Court denied the request. However, the Court directed the EEOC to respond to contention interrogatories so that the Port Authority could better determine the compensation discrimination claims. During the hearing (transcript attached), the district court judge recognized that the EEOC "had years to investigate before" bringing the complaint and referred to the investigative steps as "very much like you have had your first wave of discovery." June 7, 2011, Hearing Transcript (November 8, 2011, minute order).

Similarly, in the instant matter, contention interrogatories are clearly appropriate. OFCCP is not a private party subject to a general inability to obtain information at the beginning of litigation who must wait for discovery to bolster its claims. Rather, OFCCP is a governmental agency employing more than 600 personnel that in the instant matter took a year and a half and assigned at least 13 employees to review Oracle. None of the unfairness courts ascribe to private parties applies here as the agency has, in the words of the *Port Authority* court, "had its first wave of discovery." As an ALJ will likely be aware of OFCCP's broad investigative authority and its obligations to investigate facts prior to bringing an enforcement action, we believe that the ALJ would recognize the distinction between the instant matter and litigation involving solely private parties.

Further, Oracle's position is enhanced by the one-way nature of the exchange during the compliance review where OFCCP obtained vast amounts of information regarding its review. In turn, the Agency ignored its policy guidance requiring it to engage in a transparent investigation and stonewalled Oracle in seeking to gain basic information regarding the review. OFCCP violated its policy guidance by failing to advise Oracle of the findings before issuing a violation notice (FCCM § 2N00), failing to conduct an appropriate exit conference (FCCM § 2N), lying about conducting an exit conference, failing to issue an NOV with sufficient facts (FCCM § 8EO1), and other fatal procedural errors. Notwithstanding these failings, Oracle sought to obtain additional information from the Agency regarding its review and the Agency flatly refused to provide any substantive additional data. On April 11, 2016, Oracle requested that OFCCP provide additional information regarding its analysis along with a list of detailed questions. OFCCP responded on April 21, 2016, by providing, at best, cursory and conclusory information regarding the review. This one-way street, where Oracle produced thousands of pages of documents and never refused a reasonable request, places OFCCP in a unique position completely unrelated to private parties.



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Based on the above, OFCCP's general and specific objections regarding contention interrogatories are without merit and we request that you withdraw them.

General Objection 2. OFCCP objects to the Interrogatories to the extent that they seek information subject to at least six different privileges. OFCCP has not properly invoked these privileges and has essentially waived them. Further, as OFCCP has neither produced any documents nor a privilege log, Oracle will not detail any responses to the other general objections. Oracle reserves the right to meet and confer on these privileges after OFCCP properly invokes the governmental privileges (if not waived) and produces documents and a privilege log.

Nonetheless, OFCCP must withdraw its catchall objection attempting to preserve "[a]ny other privilege or exemption provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence or the common law." It is axiomatic that objections must be made with specificity or they are waived. *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal.1998) ("The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections"); *Painters Joint Comm. v. Emp. Painters Trust Health & Welfare Fund*, No. 2:10-CV-1385 JCM (PAL), 2011 WL 4573349, at *5 (D. Nev.Sept. 29, 2011), modified on other grounds, 2011 WL 5854714 (D. Nev.Nov. 21, 2011) (objecting party may not rely on boilerplate, generalized, conclusory, or speculative arguments). The agency's catchall attempt to preserve its privileges fails as a matter of law and must be withdrawn.

General Objection 3. OFCCP objects to providing information on the grounds that the information is not within OFCCP's custody or control or already in Oracle's "knowledge, possession, control or are equally or more readily available to [Oracle]." OFCCP's objections are improper. OFCCP's obligation is to "fully" respond to interrogatories and provide all information available to OFCCP. 41 C.F.R. § 60-30.9. Neither OFCCP's procedural rules nor the Federal Rules of Civil Procedure limit OFCCP's duty only to those matters that OFCCP believes are in Oracle's possession. *Sevey*, 2011 WL 2633826, at *4; *Cumis Ins. Soc'y, Inc. v. South-Coast Bank*, 610 F. Supp. 193, 196 (N.D. Ind.1985) ("[t]he phrase 'possession, custody or control' is in the disjunctive and only one of the enumerated requirements need be met"); *Biben v. Card*, 119 F.R.D. 421, 425 (W.D. Mo.1987) (the term "control" includes the "legal right of the producing party to obtain documents from other sources upon demand").

This objection is improper because it is based on OFCCP's own speculation as to what information is in Oracle's possession. Indeed, this objection makes little sense in light of OFCCP's insufficient investigation. During the investigation, Oracle provided OFCCP access to Oracle's facility to conduct interviews and gather additional information regarding its compensation practices. Contrary to OFCCP's allegations, Oracle never denied OFCCP access to relevant records. As such,